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United States v. Gila Valley Irrigation Dist., 859 F.3d 789 (9th Cir. 2017)

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COURT REPORTS

FEDERAL COURTS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States v. Gila Valley Irrigation Dist., 859 F.3d 789 (9th Cir. 2017) (holding that: (i) appellate court lacked jurisdiction regarding voluntary withdrawal applications in a water rights dispute because there was no actual controversy nor was there a finding of no further delay under Fed. R. Civ. P. 54(b); (ii) an applicant failed to meet its prima facie burden to establish that changing the location and type of diversion would result in no injury to other parties to an existing consent decree; (iii) a request to amend applications under Fed. R. Civ. P. 15(b)(1) during closing arguments was properly rejected as prejudicial; and (iv) building a road and canal, coupled with lengthy nonuse of water rights, supported an abandonment finding under Ariz. Rev. Stat. Ann. § 45-188(B)).

The issues presented in this consolidated appeal were: (1) the Global Equity Decree of 1935 and (2) whether landowners can transfer their rights to divert water from the Gila River that flows through southern Arizona. Specifically, whether Freeport Minerals Corporation (“Freeport”) successfully presented a prima facie case of no injury to other Decree parties, which the court held was necessary in order to sever and transfer water rights.

Litigation began regarding these water rights in 1925, when the U.S. brought suit on behalf of the Gila River Indian Community (“Community”) and the San Carlo Apache Tribe (“Tribe”) seeking to adjudicate the water rights from the Gila River. In 1935, the Global Equity Decree (“the Decree”) was entered into to govern the distribution of water among the Community, the Tribe, and various other landowners. Specifically, under the Decree, parties are entitled to divert water from the River for the beneficial use and irrigation of land in accordance with the specified priorities. Additionally, parties to the decree are permitted “to change the point of diversion and the places, means, manner or purpose of the use of the waters” to which they are entitled to, as long as they do not injure the rights of other parties.

In 1996, the District Court entered a Water Quality Injunction to protect the water rights of the Tribe. Specifically, the injunction provided that “if the water quality reaching the Tribe deteriorates below certain thresholds, the Water Commissioner is directed to take measures limiting the diversion of water rights holders.” However, in 2001, the Community, the Tribe, the United States, and the San Carlos Irrigation and Drainage District (“SCIDD”) jointly filed a post judgment complaint (“Pumping Complaint”) to enforce the Decree against thousands of upper valley landowners who were allegedly using the wells in excess of their rights.

Following the filing of the complaint, the parties (not including the Tribe or the United States) entered into the Upper Valley Forbearance Agreement

("UVFA"), dismissing the Pumping Complaint in exchange for the upper valley landowner's agreement to permanently cut back the acres they were able to irrigate by 1000 acres. Additionally, the UVFA allowed the upper valley landowners to "sever and transfer water rights from decreed lands to lands that had been irrigated but were not covered by the Decree."

In 2008, following the UCFA, over 400 sever and transfer applications were filed — fifty-nine belonging to Freeport. Freeport began purchasing farms in 1997 for the sole purpose of acquiring water rights. Freeport paid all water related fees and specifically required its tenants to maintain the water rights. In response, the United States, the Tribe, and the Community filed objections to these sever and transfer applications.

Regarding Freeport's applications, the District Court held an evidentiary hearing and denied them all on the grounds finding that: (1) Freeport had failed to present a *prima facie* case of no injury to the other decreed parties; (2) Arizona's statutory forfeiture law did not apply to Freeport's water rights; and (3) Freeport had partially abandoned the water rights on one of its proposed sever parcels. Further, the court declined to amend Freeport's applications to conform its revised maps. On appeal, the United States Court of Appeals for the Ninth Circuit ("the Court") revisited the District Court's holding to determine whether the District Court erred in granting judgment to the plaintiffs as a matter of law.

First, the Court looked to Freeport's contention that the District Court erred in holding that it failed to present a *prima facie* case of no injury to the other Decree parties. The Court observed Article XI of the Decree and the Change in Use Rule, each of which state that any parties who have decreed water rights are entitled to change the point of diversion as long as it is done without injury to other decreed parties and in accordance with applicable law and principles. The applicant for the change in the point of diversion has the burden of proof.

Freeport argued that all that would change as a result of their application is the location of the decreed rights and the associated point of diversion—there would be no increase or decrease in decreed rights as a result of the proposed severance. However, Freeport failed to present any evidence regarding the absence of injury. Applying the rule that "possible injury should be analyzed by comparing the impact of a proposed change against a baseline of existing conditions," the Court addressed points of injury that Freeport failed to rebut.

The Court first addressed the portion of the Gila River, "Cosper's Crossing," which frequently runs dry above ground. Under a prior arrangement, when Cosper's Crossing runs dry, upstream water-users are permitted to disregard senior downstream users, such as the Tribe, and divert the entire flow of the river before it reaches Cosper's Crossing. The Court found that at least one of Freeport's pending applications requesting transferring water from downstream to a location above Cosper's Crossing could cause Cosper's Crossing to run dry at an earlier point in time, which would trigger the previous arrangement and thus exacerbate the injury to the Tribe, whose water rights are already insufficient to meet their needs. Despite Freeport's argument that if such a situation occurs the Tribe can request that all diversions above Cosper's Crossing cease, the Court held that this does not prevent injury—it only operates as a remedy for injury that has already occurred.

As another point of injury, the Court pointed to the potential effect on return flows caused by changing the location of diversions. Although impact may be minimal, the burden was on Freeport to demonstrate a lack of injury. However, Freeport failed to present such evidence. Further, the Court noted the negative impact on water quality caused by changing the type of diversion. At least one of Freeport's applications requested change from a ground level diversion to a pumping diversion which has higher salinity levels. This would have increased the overall salinity levels in the Gila River thus negatively affecting the Tribe which requires fresh water in order to irrigate and grow crops.

After evaluating the injury, the Court next assessed the District Court's ruling that a "prolonged period on non-use coupled with improvements to the property (the construction of a road and canal) were incompatible with irrigation," thus providing sufficient evidence that Freeport intended to abandon its water rights. Freeport argued that there is no intent to abandon because: (1) it bought the farmlands for the purpose of acquiring water rights; (2) it required lessees to maintain its water rights; and (3) it paid all water right related taxes and fees. The Court held that purchasing land with the intention of acquiring the water rights, as well as requiring lessees to maintain water rights, is irrelevant if those rights are not acted upon after purchase by removing developments that are inconsistent with water usage (canals and road).

The Court affirmed the district court's decision denying Freeport's applications. However, it reversed the district court's decision that Arizona's statutory forfeiture law did not apply to Freeport's water rights. The Court remanded the remaining objections filed by the United States, the Tribe, and the Community to the district court.

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STATE COURTS

COLORADO

Gallegos Family Props., v. Colo. Groundwater Comm'n, 398 P.3d 599 (Colo. 2017) (holding that: (i) evidence that groundwater and a creek had been connected at the time of designation of the groundwater was not a condition newly discovered or occurring after the original basin designation date, and therefore was insufficient to modify a basin boundary under Colo. Rev. Stat. section 37-90-106(1)(a); (ii) claim preclusion applied because the issue of connectivity was not litigated at the time of the designation proceeding; and (iii) costs recovered by the prevailing well owners were reasonable and necessary).

Gallegos Family Properties, LLC ("Gallegos") appealed, for a second time, to the Supreme Court of Colorado in hopes of de-designating a portion of the Upper Crow Creek Designated Ground Water Basin ("the Basin"). Specifically, Gallegos petitioned to re-draw the Basin boundaries to exclude twenty-five wells on Crow Creek, thus curtailing the junior water rights of the well owners ("Well-Owners") in favor of Gallegos's senior water rights.

Gallegos owns what is known as the "Larson Rights," which consist of surface rights to a combined flow of 413 cubic feet per second in Consolidated Larson Ditch and 59.5 acre-feet of storage rights in Larson Reservoir #1. Deeded in 1914, these rights divert from a headgate on Crow Creek that originates